EDITOR'S NOTE

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86-721 (1)

No. 85-1060

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN R. PRAGER, Petitioner,

v.

DONALD P. HODEL, Secretary of the Department of Interior, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 1, 1986

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QUESTIONS PRESENTED

1. Is the Secretary of the Interior, having accepted as "complete" a petition for designation of Federal lands as "unsuitable" under the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1272(a)(2)), required to consider "surface coal mining operations" defined in the Act, regulations, and specified in the petition in arriving at his decision?

2. Is the Secretary of the Interior required to consider the environmental impacts of "surface coal mining operations" set forth in statute and other environmental impacts identified during the "unsuitability" petition evaluation pursuant to the National Environmental Policy Act of 1969 in arriving at his decision?

3. Did the court below err in its decision that the Secretary's decision as to economic feasibility of reclamation pursuant to the requirements of statute considered all relevant factors, was supported by legally sufficient evidence, and was not arbitrary, capricious, and otherwise inconsistent with law.

LIST OF PARTIES

Parties to the proceedings below were the petitioner, John R. Prager and respondent Donald P. Hodel, Secretary of the Department of the Interior.

Proceedings were retitled by the Court of Appeals for the Fifth Circuit. Original parties were James Watt, Secretary of the Interior and Richard Harris, Director of the Office of Surface Mining.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, John R. Prager respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-titled proceedings on July 9, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported and is reprinted in the appendix hereto.

Petition for rehearing was denied on August 4, 1986. Order per curiam is reprinted in the appendix hereto.

The order of the United States District Court for the Western District of Texas has not been reported and is reprinted in the appendix hereto.

JURISDICTION

Petitioner brought suit seeking judicial review of respondent's administrative decision in the United States District Court for the Western District of Texas under 30 U.S.C. 1276(a)(1).

Petitioner appealed the judgment of the district court to the Court of Appeals for the Fifth Circuit under 28 U.S.C. 1291 and 30 U.S.C. 1276(a)(1).

This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 706(2)(A). Administrative Pro- Act. (Hereinafter "APA").

30 U.S.C. 1201-1328. Surface Mining Control and Reclamation Act of 1977. (Hereinafter "SMCRA").

42 U.S.C. 4321-4347. National Environmental Policy Act of 1969. (Hereinafter "NEPA").

Code Of Federal Regulations.

30 CFR 700, et seq., Surface coal mining regulations.

40 CFR 1500, et seq., Regulations implementing NEPA.

STATEMENT OF THE CASE

Petition was filed on August 7, 1981 to designate Federal lands known as the Camp Swift Known Recoverable Coal Resource Area unsuitable for surface coal mining operations in accordance with statute and regulations. 30 U.S.C. 1272(a)(c) and 30 CFR 769, et seq.

Petition sought designation of unsuitability for "surface mining and related activities, such as water detention impoundments, haulage roads, storage and loadout facilities and similar activities." (Camp Swift, Texas Petition Evaluation Document," A-3. Hereinafter "PED").

On September 10, 1981 petition was accepted as "complete" by the Secretary. In so doing, the Secretary exercised considerable discretion: the petition posed significant issues, i.e. it was not "frivolous;" that the area contained recoverable coal (lignite) deposits; that it was

properly identified as to size and location; that the allegation of facts and supporting evidence was sufficient; and that there was sufficient showing of how surface coal mining operations would adversely affect resources and petitioner's interests.

The petition was amended to include additional lands within the Known Recoverable Coal Resource Area on October 19, 1981 and the Secretary combined the petition and amendment on November 16, 1981.

Under the Secretary's regulations once the petition was accepted as "complete" the petitioner bore no burden of proof. 30 CFR 764.15(3). However, in response to the Secretary's invitation a great deal of factual information was provided by the petitioner during the evaluation process. There were no intervenors.

Public hearings were held on June 7, 1982 and written comments were considered if postmarked not later than June 14, 1982. Since several important documents and

contract studies conducted by the Secretary were not available in the Bastrop Library public file at the time of the public hearing, petitioner and other participants in the hearings requested that the comment period be extended. Hearing Examiner denied this request on the grounds of statutorily established deadlines. This ruling by the hearing examiner was erroneous and contributed to the discovery of some of the grounds for this case to be uncovered too late for presentation during administrative process. Deadlines of Section 1272(c) of SMCRA are "directory rather than mandatory." Administrative Record at p. 2469-2474. Hereinafter "A.R." See Utah International Inc. v. Department of the Interior, 553 F.Supp 872,883,884.

On August 6, 1982 the Director, Office of Surface Mining, acting for the Secretary, denied the petition. Issued that date by the Secretary were four documents:

"Decision," "Statement of Reasons," the PED, and "Finding Of No Significant Impact On The Quality Of The Human Environment," hereinafter "FONSI."

It became apparent to petitioner after a study of these documents (and such portion of the administrative record as was then available in the public file in Bastrop, Texas), that the Secretary had not considered critically relevant "surface coal mining operations" mandated for consideration by SMCRA and contained in the "complete" petition, and had failed to consider certain other relevant factors and issues raised during the petition evaluation process. Further, the Secretary provided no explanation for the decision not to consider these relevant factors.

Moreover, the Secretary had not given notice to petitioner of this drastic "revision" of the petition. The regulations do not provide for administrative appeal of

the Secretary's decision.

Petitioner, acting pro se, filed complaint in district court on October 4,1982 pursuant to 30 U.S.C. 1276(a)(1).

Petioner sought judicial review of the Secretary's decision, alleging, inter alia, violations of SMCRA, NEPA, APA, and agency regulations. After cross-motions for summary judgment and filing of briefs, the district court entered judgment in favor of the Secretary on December 4, 1984. Notice of appeal and appeal were timely filed.

Judgment of the district court was affirmed by the Fifth Circuit on July 9, 1986. Petition for rehearing was denied by Fifth Circuit on August 4, 1986. There was no oral argument in the proceedings below.

Findings of the district court:

1. The Secretary's decision involved rulemaking and thus the "arbitrary, capricious, or otherwise inconsistent with law" stan-

dard of review applied. This finding is not in controversy.

2. The record contained "a great deal of evidentiary support" for the decision.

3. The record showed "a consideration of all relevant factors."

The present controversy originates in the Secretary's failure to consider certain relevant factors; however, two determinations of the Secretary merit emphasis:

> 1. "The evidence does however, indicate a certain potential for adverse impacts on the hydrology and agricultural productivity of the drainage basin as the result of surface coal mining methods."
>
> "Decision," A.R. 4066.
>
> 2. "The adverse impacts described herein would not normally be mitigated by usual site-specific measures."
>
> PED I-4.

The Secretary acknowledges the failure to consider "surface coal mining operations" defined in SMCRA. These are defined in statute at 30 U.S.C. 1291(28)(A)(B):

> "Surface coal mining operations means - activities conducted on the

> surface of lands in connection with a surface coal mine . . . . Such activities include excavation . . . physical processing ... loading of coal . . . the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by . . . new roads . . . use of existing roads . . . to gain access . . . for haulage . . . impoundments . . . dams, stockpiles, overburden piles . . . repair areas, storage areas, processing areas, shipping areas. . . ."

This definition is incorporated verbatim in the Secretary's regulations at 30 CFR 700.5. This definition is further refined as regards certain terms in regulations at 30 CFR 701.5.

That the Secretary did not consider these "surface coal mining operations" as specified in the "complete" petition is not in dispute. PED F-106.

That the Secretary did not consider the impacts (environmental, technological, and economic) on "surface coal mining and reclamation operations" of the following

relevant factors in the petition area is a material fact not in dispute:

1. Wildlife populations and valuable wildlife habitat (except for the endangered species). PED F-153. The Secretary acknowledges the area possesses "the characteristics of a wildlife reserve." PED II-15.

2. University of Texas Cancer Research Center.

3. Cultural resources (otherthan cemeteries).

4. Mandated relocation of Texas National Guard training and support facilities.

Proposed reclamation measures. In acknowledging that "usual site-specific" measures" will not suffice to mitigate the adverse impacts identified, the Secretary proposed a number of novel and untested methods never attempted in Texas lignite mining operations: segregation, storage, and replacement of major aquifer channel sands. Statement of Reasons, A.R. 4072;

segregation, storage, and replacement of topsoil and weathered overburden in order to minimize flooding and sedimentation and for revegation. PED IV-13,14,27; segregation and burial of the "impermeable claypan." PED IV-9 and F-179; revegetation, employing seeding of native grasses over established, introduced coastal bermudagrass PED IV-27, 29; simulation or reconstruction of endangered species habitat. PED IV-5; isolation, segregation, and burial of multiple acid-forming and toxic strata. PED IV-11, A.R. 2443.

No evidence of economic feasibility. There is absolutely no evidence in the record as to the economic feasibility of these reclamation methodologies nor that the Secretary even considered their economic feasibility during the petition evaluation.

Opinion of the Fifth Circuit. In response to the question from Fifth Circuit: "What evidence, if any, does the record

contain concerning economic feasibility? Cite the places in the record;" the Secretary provided three page citations (in a record consisting of over 4000 pages), none of which related to the economic feasibility of these other-than-usual proposed reclamation techniques.

In affirming the judgment of the district court, Fifth Circuit held:

> "Rather, the PED repeatedly refers to reclamation technologies which have been employed in other surface coal mining operations, thus indicating the economic feasibility of such approaches."
>
> Opinion 7083. Emphasis added.

The court below infers something which the Secretary does not in the record claim for the novel and untested reclamation proposed. Nowhere in the record does the Secretary proffer this explanation for these techniques.

Furthermore, Fifth Circuit's unwarranted and unsupported inference contradicts the Secretary's own determination, cited supra,

that adverse impacts would not be mitigated by usual measures. The court below does not provide citations from the record to support its finding.

Neither does the finding take into account the atypical physical characteristics of the petition area. Soil Conservation Service and Texas Railroad Commission soil scientists advised that "vegetation species were atypical," "geologic strata was not typical," and that dominant soils were "highly subject to erosion." A.R. 1205. Texas Department of Water Resources advised:

> ". . . the aquiclude separating the base of the lignite from the first sand in an underlying aquifer is thinner in the Camp Swift area than at most existing mining operations."
>
> A.R. 1099.

Similarly, Fifth Circuit does not provide citation from the record for the <u>one</u> instance offered to support finding that, ". . . the Secretary was sensitive to the

costs of the reclamation methods."

Opinion 7083. The court below apparently alludes to the PED IV-29 statement:

> ". . . the normal fertilization program necessary for vegetation on randomly mixed overburden would not be an economically viable option, given the land use.
>
> Emphasis added. (The opinion uses the term, "cost prohibitive.").

It is an unwarranted assumption, not supported in the record, that the proposed alternative scheme (which requires the segregation, storage, and replacement of topsoil and weathered overburden and the burial of the existing "claypan, and reseeding of native grass over established coastal bermudagrass) is economically feasible. In any event, the Secretary has provided no evidence of consideration of economic feasibility in the record.

The court below refers to "repeated" references in the PED to reclamation technologies used in other surface coal mines. The court below apparently refers to

sedimentation ponds, "standard" gradient-control structures, final-cut impoundments, etc. commonly used to reduce flooding and sedimentation, to control stream-bank erosion, and to reduce water quality degradation. PED IV - 9 to 14. (Final cut impoundments are suggested as "potentially applicable." PED IV-9,10.).

However, unlike other lignite mining areas in Texas, the petition area contains extensive designated floodplains and flood hazard areas. PED II-4. Thus far lignite mines in Texas have avoided floodplains. Bureau of Economic Geology states in the record:

> "If mining is to occur on floodplains it will require some method to avoid floods. Small streams whose floodplain represents only a minor part of the total mining area could conceivably be diverted around the mining operation. Mines totally within floodplains would . . . (require) reservoirs or extensive dike systems. Either would add considerably to the cost of mining."
>
> A.R. 753A-26. Emphasis added.

The Secretary does not in the record assert (or provide evidentiary support) that these methods are <u>economically</u> feasible, only that they are <u>technologically</u> possible. Fifth Circuit provides its own inference (or the argument of appelate counsel) in the absence of evidence in the record as to economic feasibility.

Furthermore the Secretary acknowledges the great variation (the revegetation potential study calls it, "a tremendous amount" A.R. 287.) which exists among various mining areas. For example, the development of acid soils, which is a major constraint on revegetation:"

> "However, a great amount of variation in pH problems are found between and within lignite mining areas in Texas."
>
> Statement of Reasons, A.R. 4078.

For these reasons, the Bureau of Economic Geology warns of the dubious applicability of revegetation studies at other lignite mining operations: "The

applicability of these (studies) to other lignite areas is uncertain." A.R. 2440.

"Prejudging" the feasibility. Fifth Circuit comments that petitioner "particularly complains" that the Secretary argues that ultimate "economic feasibility" will be determined by the operator at the mine permit stage. The court below apparently misunderstands the nature of the petitioner's objections to the Secretary's position before the district court. The Secretary stated:

> "Since a decision as to the economics of a reclamation plan can best be made at the time of a decision on the permit application, the regulatory authority should avoid prejudging the feasibility of mining in advance of this process."

This argument is spurious and reflects a profound misconstruction of statute and congressional intent. SMCRA mandates the "prejudging" of the economic feasibility of conducting "surface coal mining operations" during the unsuitability

petition evaluation process. 30 U.S.C. 1272(a)(2),(c). The Secretary has no statutory authority to consider economic feasibility, "at the time of a decision on the permit application." 30 U.S.C. 1260 (a)(b).

The Secretary's position is held in the face of express congressional intent:

> "The Committee believes that the area-by-area approach of Section 522 (unsuitability) thus serves the industry since such a process may, in advance of application, identify lands which are either not open to surface mining or where surface mining is subject to restrictions."
>
> Committee on Interior and Insular Affairs, H.R. Report No. 95-218, April 22, 1977. Emphasis added.

Petitioner's objection to the Secretary's stated philosophy on economic feasibility is that it is contrary to express intent of Congress and the plain language of statute, and that it is reflected concretely in the Secretary's evaluation of the unsuitability petition.

Petitioner points out that once fore-

warned the operator may still develop a specific mining and reclamation plan, and petition for termination of the unsuitability designation. 30 CFR 769. Further, the prospective operator may continue or initiate coal exploration on lands designated unsuitable. 30 U.S.C. 1272(a)(1) 30 CFR 762. 14.

For, however well-intentioned and optimistic the prospective entrepreneur-operator, it is a fact amply demonstrated in the legislative history of SMCRA and reflected in the findings of the Congress, at 30 U.S.C. 1201(c)(h), that unplanned-for adverse physical mining and reclamation problems, changing economic conditions, bankruptcies, etc. have plagued the industry and resulted in the abandonment of thousands of mines in the past.

For that reason, SMCRA establishes the "abandoned mine" fund and reclamation program. 30 U.S.C. 1231.

For that reason the Congress seeks to avert future problems by stating as a purpose of SMCRA: "assure that surface mining operations are not conducted where reclamation as required by this chapter is not feasible;" 30 U.S.C. 1202(c). For that reason, Congress has established the unsuitability provisions of SMCRA, which accord parity to economic and technical factors in the mandated Secretarial determination. 30 U.S.C. 1272(a)(1),(c).

An unsuitability evaluation which devotes over 4000 pages to technical considerations and not one page to economic evaluation cannot objectively be said to fulfill the congressional purpose or mandate.

SMCRA and NEPA. Similarly, it is a purpose of SMCRA to:

> ". . . strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy."
>
> 30 U.S.C. 1202(f).

Petitioner observes that the Secretary's determination of "need" for petition area lignite was based upon the Department of Energy "high demand scenario" which projected Texas lignite demand as 384 million tons. The Bureau of Economic Geology has seriously questioned the reasonableness of the Secretary's projections:

> "Texas coal production is predicted at 384,000,000 tons for 1995. Estimates made by Bureau personnel indicate this estimate is more likely 100 to 150,000,000 tons.
>
> PED F-22. Emphasis added.

The Secretary responded:

> "If there is a lower demand for Texas coal, the petition area coal would not be included in the optimal solution for 1995."
>
> PED F-22. Emphasis added.

The record is devoid of evidence that the Secretary undertook this fundamental balancing of need versus environmental protection. Indeed, the Secretary found:

> "The consumption of coal by the United States, however, will not be affected by supply constraints in

the foreseeable future."

PED III-4.

In any event, SMCRA provides that:

> "Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing . . . the National Environmental Policy Act of 1969 (42 U.S.C. 4321-47) . . ."

30 U.S.C. 1292(a).

Accordingly, the Secretary announced the intention to combine the unsuitability petition:

> ". . . with an environmental assessment of the possible effects on the petition area <u>resulting from any Federal actions</u>. This combined evaluation and assessment has been made to avoid duplication and to reduce paperwork."

PED I-4. Emphasis added.

The Secretary's declaration simply does not square with his postponement of consideration of many impacts and avoidance of other significant impacts altogether. Specifics as to the unavoidable and identifiable environmental impacts within the petition area which were not analyzed by

the Secretary as required by NEPA were set forth in detail by petitioner during the petition evaluation process and are in the record, and were briefed before the court below.

It is manifest that the FONSI falls far short of the Secretary's stated objective. The decision not to evaluate wildlife and valuable wildlife habitat and unavoidable surface coal mining operations, cited supra, assures that. But, even at its best FONSI is a broad-brush, over-simplified treatment of serious environmental impacts which are uncertain or involve unknown risks. (see 40 CFR 1508.27(5).) Example:

> (From the FONSI) - "Regarding the quality and quantity of the sole-source aquifer : The hydrology model does not demonstrate that water quality in the Simsboro aquifer would be significantly degraded in the long term."
>
> A.R. 4061. Emphasis added.

> (From the hydrology model report) - "Effects due to mining on water quality in the Simsboro cannot be adequately determined, as a result of an absence of good, quantifiable data."
>
> A.R. 2800. Emphasis added.

Relocation of the Texas National Guard training and administrative facilities, not evaluated in the NEPA analysis, is an unavoidable impact sufficient in itself to trigger the preparation of an Environmental Impact Statement as a "major federal action." Department of the Army, the surface manager, has stipulated:

> "Any facilities or improvements which will be destroyed by the mining operations must be replaced to the satisfaction of the Adjutant General, Texas, without cost to the State or Federal Government, prior to destruction of existing facilities."
>
> A.R. 1040. Emphasis added.

Texas National Guard has identified the facilities which would be affected and the site (on the Camp Swift Military Reservation outside of the petition area) for

reconstruction. PED F-151,161. A list of the facilities requiring relocation was provided Bureau of Land Management, the mineral estate manager, and petitioner. It includes: airfield, helicopter pads, administrative support and maintenance buildings, two mess halls, latrines, potable water supply, firing ranges, roads, gates, fences etc. The Secretary's position in the court below was that this significant impact could not be evaluated because it is "impossible to determine what facilities must be relocated."

As regards the environmental impacts on the University of Texas Cancer Research Center, which is within the petition area, the Secretary argued before the district court that there was no "indication" that the Center would be affected, and later, that no mining "has even been proposed" in the Center, and that it was "separated" from the rest of the petition area by a

road. These are obviously spurious issues since the Secretary found that no mining is proposed for any part of the petition area. PED I-4.

There is expert testimony in the record of projected serious impacts to this important scientific resource and the endangered species propagated there. A.R. 2089-2089C. The Center is not mentioned in the FONSI. In addition to the NEPA-mandated analysis (40 CFR 1508.27), SMCRA requires evaluation of impacts on "scientific" values during the unsuitability process. 30 U.S.C. 1272(a)(3)(B).

The Texas State Historic Preservation Officer informed the Secretary that the petition area contains sites which have been "archeologically evaluated" as eligible for the National Register of Historic Places. A.R. 1078. NEPA requires analysis of impacts of these non-renewable cultural resources. 40 CFR 1508.27. Although the

Statement of Reasons notes that "special consideration" would would have to be incorporated into any mining and reclamation plan (A.R. 4082), the FONSI contains no mention of these properties. SMCRA requires evaluation of important historic and cultural values during the unsuitability process. 30 U.S.C. 1272(a)(3)(B).

In summary, Petitioner emphasizes that the Secretary purports to evaluate mining operations projected to produce 17.9 million tons of lignite per year for 25 years. This is a "major Federal action" by anybody's definition. It involves the consumption of 218 million tons of lignite, a non-renewable resource. PED III-2, III-7. Patently, an environmental analysis which concludes that there will be <u>no significant impact</u> on the human environment is inadequate, in terms of the requirements of NEPA. Further, manifestly the costs of reclamation and mitigation associated with

conducting surface mining operations in or near lands containing "numerous" cultural resources, the Cancer Research Center, and reconstruction of the National Guard facilities will be significant, well above that incurred by the typical surface mine. In assessing economic feasibility, the Secretary takes no notice of these extraordinary expenditures.

"Area" versus "site." The Secretary has made much of this apparent distinction which, although not mentioned in SMCRA, does appear in the legislative history. Report of the Committee on Interior and Insular Affairs, H.R. Report No. 95-218, April 22, 1977. The court below comments that one purpose of the unsuitability process, ". . . is to address the feasibility of reclamation on an area basis." Opinion, 7083.

In this case there is no discernible difference between "area" and "site." The

petition did not include the entire Camp Swift Military Reservation, but only so much as has been designated as a Known Recoverable Coal Resource Area, (KRCRA) by by U.S. Geological Survey in accordance with the Minerals Leasing Act of 1920, as amended. The entire KRCRA/petition area is underlain by lignite. PED III-2, III-4.

The Secretary assumed mining of the entire KRCRA in determining:

> "(1) the potential coal resources of the area,(2) the demand for coal resources, and (3) the impact on the economy and the supply of coal from designating the area unsuitable for surface coal mining operations."
>
> PED III-1, III-5,6,7.

Proceeding from these base-line assumptions, the Secretary projected a need for all of the KRCRA lignite. The Secretary then adopted hypothetical "potential mining levels," developed by Bureau of Land Management:

> "OSM has used these levels on which to base the evaluation of the petition allegations, because <u>no mining is presently proposed for the petition area</u>."
>
> PED I-4. Emphasis added.

Since the evaluation projected the mining of all the petition-area coal at a pace which was hypothetically projected it can be seen that, in this case, the distinction between "area" and "site" which the Secretary and the court below have elaborated is without significant meaning.

"Hypothetical" surface mining operations. Furthermore having projected a level of extraction which is hypothetical within an area which will be totally mined, it is irrational for the Secretary not to consider, unavoidable, concomitant "surface mining operations" defined in SMCRA on the ground that they are "hypothetical."

In this regard, petitioner notes that the contracted Camp Swift Hydrologic Evaluation did, indeed, develop two mining "scenarios" in order to assess stresses on the aquifer. A.R. 2817. Similarly, volumes of projected water discharges and floods have been modeled in the contracted

technical study. Topographical and soils data have been assembled.

Certainly the Secretary possesses the expertise to realisticically project the numbers of impoundments and siltation ponds required to handle discharge and run-off water, given the levels of extraction projected. These are "coal mining operations" defined by SMCRA for which "standards" and "requirements" have been promulgated. 30 U.S.C. 1265, 30 CFR 715.

The Secretary - who approves or rejects mining and reclamation plans routinely - is competent to reasonably project the mining-related "surface coal mining operations" required to support the levels of mining assumed.

The Secretary argued, apparently with effect, before Fifth Circuit, "There is simply no reason to analyze hypothetical mine related facilities." This argument contrasts starkly with the opinion in the

in the only case directly relevant to this case:

> "An unsuitability decision cannot be made in a vacuum. To determine the affects of surface mining, the decision maker must either refer to a hypothetical operation or an existing or proposed operation."
>
> Utah International at 881.

Technology versus economics. Fifth Circuit does not accurately describe the petitioner's position relating to technologic feasibility. The opinion states at 7082, "Prager fully concedes" the propriety of the Secretary's technologic feasibility determination. Petitioner's concession was "for the sake of argument." Petitioner raised the issue in the court below only to demonstrate the magnitude of the Secretary's disregard for economic implications and environmental uncertainties of proposed novel reclamation techniques.

Petitioner begs the Court's indulgence so that one example, central to the Secretary's decision, may be discussed. Success of the

proposed revegetation technology is crucial for future land use, restoration of the aquifer, flood prevention, and prevention of degradation of surface water; this the PED acknowledges.

The entire evidentiary support for the proposed revegetation scheme is <u>one</u> telephone call (which is not in the record):

1. From the contracted revegetation potential report: "It has been <u>suggested</u> that this loss of vigor (after suspending fertilization) may be used benefically to establish native grass species on areas initially <u>seeded</u> and stabilized by coastal bermudagrass. (Hossner 1982). <u>This approach has not been tested in the field, however</u>."

   "Hossner, L.R. 1982. Personal communication." (From the bibliography).

   A.R. 553,566.

2. From the PED: "It has been suggested that this loss of vigor may be used benefically to establish native grass species on areas initially <u>seeded</u> and stabilized by coastal bermudagrass (Hossner, l.r., oral commun, 1982."

   PED IV-25. Emphasis added. Note the elimination of "no testing" comment.

3. From the PED: "Coastal bermudagrass does not produce viable seed."

PED F-4 Texas State Conservationist.

4. From the Statement of Reasons: "SCS has issued technical guides . . . These guides are applicable for establishing vegetation on surface-mined lands in the Camp Swift area."

A.R. 4080.

5. From the SCS "Technical Standard and Specifications for Surface Mined Lands,": "IV. Permanent vegetation. A. Types of Seedbeds - all plantings will be made on a firm seedbed free of competing vegetation."

A.R. 4229. Emphasis added.

Petitioner, a former coalminer who has farmed for many years in Bastrop County, is obviously without technical competence to contest the the Secretary's determination that the revegetation scheme will work. Petitioner's presentation in court below was that this is a thin, untested methodology, replete with technological question marks, which is absolutely vital to the reclamation of the petition area. The Secretary has offered not one shred of evidence that it is economically feasible.

REASONS FOR GRANTING THE WRIT

1. The court below did not conduct a searching and careful inquiry.

The court below erred in not conducting the substantial, thorough, in-depth review required by this Court and APA. Citizens to Preserve Overton Park v. Volpe 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed 2d. 136 (1971). The issues presented in this petition were argued and briefed in the Fifth Circuit and in the district court. They were not reached in the court below. These issues are necessary subsidiary elements of the conclusory opinion of the court below: that the Secretary considered "all relevant factors."

The court below erred in not addressing the issue of the Secretary's determination not to consider "surface mining operations" other than extraction, i.e. "mine-related activities."

By his own acknowledgement, the Secretary

failed "to consider an important aspect of the problem." This Court has found such actions impermissible. Motor Vehicle Manufacturers Assn v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29,43, 103 S.Ct. 2856,2867, 77 L.Ed.2d 443 (1983).

The issue of the Secretary's non-compliance with the National Environmental Policy Act of 1969 was completely ignored in the court below although this issue was briefed and argued. The Secretary has acknowledged deferring consideration of important environmental impacts. Courts have found such actions impermissible. Calvert Cliff's Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d. 1109, (D.C. Cir., 1971).

2. The court below erred in upholding the the Secretary's misconstruction of statute and congressional intent.

In upholding the decision of the Secretary that surface mining and reclamation was economically feasible within the pet-

ition area the court below validated the clear error of judgment of the Secretary not to consider all "surface coal mining operations." In evaluating the economic feasibility of reclamation under SMCRA, the Secretary acted under the mandatory provisions of statute. 30 U.S.C. 1272(a)(2). Upon completion of his evaluation, the Secretary issued a comprehensive 15-page "Statement of Reasons" explaining the basis of the decision that reclamation was feasible. Administrative Record 4068-4082. This statement contains not one reference to the economic feasibility of the several novel reclamation techniques proposed to counter the adverse environmental impacts which the Secretary acknowledges will occur. The administrative record consists of 4406 pages. Not one page is devoted to the discussion of economic feasibility.

The Secretary's decision as to economic feasibility is not explained. This Court

and courts generally have long held that agency decisions must be explained, not merely explainable. Security and Exchange Commission v. Chenery Corp., 318 U.S. 80, (1943).

Fifth Circuit erred in substituting inferences improperly drawn from meager and oblique references to the implied efficacy of certain reclamation techniques in the administrative record. The court below parrots in its opinion the post hoc rationalizations of the Secretary's appellate counsel. In support of these assertions petitioner notes that under specific questioning by the court below, the Secretary was unable to cite one page in the extensive record which provided support for the economic feasibility of even one of the several novel reclamation techniques proposed. Fifth Circuit chose not to do so either. The Fifth Circuit's inference that certain reclamation practices were employed

elsewhere, ". . . thus indicating the economic feasibility of such approaches," is juridically (and substantively) incorrect. It is an echo of argument used by counsel in the court below. It is not an argument advanced by the Secretary in the administrative record or his "Statement of Reasons." This Court and courts generally have held the action of the court below to be impermissible. Burlington Truck Lines v. United States, 371 U.S. 156, 9L.Ed. 2d.207, 209,216, 83 S,Ct. 239. Moreover, this Court has held that a reviewing court not attempt to remedy deficiencies in an agency's decision based on reasons not advanced by the agency itself. Security and Exchange Commision v. Chenery Corp., 332 U.S. 194,196, 91 L.Ed. 1995, 67 S.Ct. 1575, (1947).

In validating the Secretary's actions on economic feasibility, the Fifth Circuit has lent credence to the false philosophy that the regulatory authority should avoid

"prejudging the feasibility of mining," when the plain language of statute and the express intent of Congress in the legislative history mandates that he do so. Thus the court below errs in sanctioning: postponement of evaluating wildlife and wildlife habitat, mining related surface coal mining operations, impacts on important cultural and scientific resources, impacts of certain environmental impact of relocation of existing facilities within the unsuitability petition area. Failure to consider these impacts and activities in the face of the plain language of statute (30 U.S.C. 1272,1292 and 42 U.S.C 4322), is manifestly arbitrary and capricious and a clear error of judgment on the part of the Secretary. Overton Park at 415,416, 417.

Further, judgment of the court below, if permitted to stand will render the unsuitability petition provisions of SMCRA

meaningless. The decision of the court below confers authority, to defer or not consider, not granted by the Congress. SMCRA confers upon the Secretary wide discretion to decide, there is not a hint in statute or legislative history that the Congress authorized him not to consider. If the Secretary may, arbitrarily and without notice to petitioner, simply vacate or disregard vital elements in a petition accepted as "complete" under the Secretary's own regulations, citizen participation will be chilled. The legislative history reflects the opinion of the Congress: "the success or failure" of SMCRA depends to great extent upon citizen participation. The unsuitability provision of SMCRA will become a redundancy. This Court has ruled that a construction of the law which has this effect is impermissible. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d. 859 (1961).

CONCLUSION

For these several reasons, this petition for certiorari should be granted. The issues raised are procedural, not substantive. The surface coal mining regulations are not challenged. At issue is the Secretary's application of regulations and statute, as they are modified and validated by the actions of the court below. This case poses no questions of material fact which are in controversy. It does not challenge the technical or scientific expertise of the Secretary. The issues raised do, however, have nation-wide significance and possess wide precedential importance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

John R. Prager,
Plaintiff-Appellant,
v.
Donald P. Hodel, Secretary of the Department of the Interior, et al.,
Defendants-Appellees.

No. 85-1060
OPINION

Filed July 9, 1986

Before: Alvin B. Rubin, Henry A. Politz, and Sam D. Johnson, Circuit Judges

Opinion by Judge Sam D. Johnson

Appeal from the United States District Court
for the Western District of Texas
Walter S. Smith, Jr., District Judge, Presiding

SUMMARY

Mines and Minerals

Appeal from ruling upholding administrative agency's decision. Affirmed.

Appellant Prager filed a petition to have land designated unsuitable for surface coal mining. After conducting an extensive study, the Office of Surface Mining Reclamation and Enforcement (OSM), declined to designate the land unsuitable. Appellant thereafter filed a pro se complaint in federal district court, seeking judicial review of OSM's decision. After considering summary judgment motions, the district court granted summary judgment for OSM. Prager appeals. [1] Areas shall be, by petition, designated as unsuitable for surface coal mining if the regulatory authority determines that r eclamation is

not technologically and economically feasible..

[2] In reviewing OSM's decision this court must determine whether OSM acted arbitrarily and capriciously in its determination. This standard requires the reviewing court to make a searching and careful inquiry into the facts before the agency and to consider whether there has been a clear error of judgment. The reviewing court is not empowered to substitute its judgment for that of the agency. [3] Here, Prager's contention that OSM acted arbitrarily and capriciously in determining that reclamation was not economically infeasible is not supported by the evidence where the record repeatedly refers to reclamation technologies which have been employed in other surface coal mining operations, thus indicating the economic feasibility of such approaches. Since one purpose of the unsuitability process is to address the feasibility of reclamation on an area basis, this court cannot agree that OSM wholly abandoned the issue of economic feasibility. Therefore, OSM did not act arbitrarily and capriciously in declining to designate the land as unsuitable for surface coal mining.

OPINION

SAM D. JOHNSON, Circuit Judge:

[1] John R. Prager, a resident of Bastrop County, Texas, petitioned the Secretary of the Interior in an effort to designate the Camp Swift Military Reservation ("Camp Swift") in Bastrop County unsuitable for surface coal mining. *See* 30 U.S.C. § 1272. Prager filed his petition pursuant to the terms of the Surface Coal Mining and Reclamation Act of 1977 (the "Act"), 30 U.S.C. §§ 1201-1328, which provides that areas shall be, upon petition, designated as unsuitable for surface coal mining if the regulatory authority determines that reclamation "is not technologically and economically feasible." 20 U.S.C. § 1272(a)(2). After conducting extensive study, the Secretary of the Interior, acting through the Director of the Office of Surface Mining Reclamation and Enforcement ("OSM"), declined to designate the Camp Swift area as unsuitable under section 1272. Prager brought an action in federal district court seeking

review of the Secretary's decision. *See* 30 U.S.C. § 1276. The district court rejected Prager's challenge. On appeal, Prager contends that the Secretary acted arbitrarily and capriciously in his decision by failing to adequately consider the "economic feasibility" of reclamation of the Camp Swift area. After reviewing the administrative record presented to the Secretary, this Court finds that the Secretary adequately considered economic feasibility in the context of an unsuitability determination. Accordingly, we reject Prager's challenge and affirm the judgment of the district court.

A brief overview of the Act and regulations is necessary to present the instant case in the proper context. The Act provides a plan for assuring that surface coal mining will be conducted in such a manner to minimize the adverse impact of coal mining while assuring the nation an adequate supply of coal. *See* 30 U.S.C. § 1201. Consequently, the Act provides for standards governing the performance of surface coal mining operations and the reclamation of lands upon which operations are conducted.[1] Before any mining operation can take place, the proposed operator must submit a permit application and a reclamation plan which satisfies the requirements of the Act and the regulations promulgated under the Act.

Thus, the Act imposes environmental standards on surface coal mining and assures compliance with these standards through the permit application process. In addition to this mechanism, Congress also provided a process whereby a citizen may petition to have an entire area designated as unsuitable for all or certain types of surface coal mining operations. 30 U.S.C. § 1272(c). The Act states that the Secretary "shall designate an area as unsuitable for all or certain types of surface coal mining operations if the . . . regulatory authority determines that reclamation pursuant to the requirements of this

[1]The standards mandated by the Act with which the operator must comply include requirements that surface coal mine operators restore disturbed land to its approximate original contour, stabilize and protect all surface areas to prevent slides, erosion and water pollution, restore topsoil removed during surface coal mining operations to assure revegetation of the land in accordance with the requirements of the Act, use the best technology currently available to prevent damage to fish and wildlife, avoid acid or toxic mine drainage into the prevailing water systems, and minimize disturbance to the prevailing hydrologic balance. 30 U.S.C. § 1265.

[Act] is not technologically and economically feasible." 30 U.S.C. § 1272(a)(2). Further, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will

> (A) be incompatible with existing State or local land use plans or programs; or
>
> (B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or
>
> (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or
>
> (D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

30 U.S.C. § 1272(a)(3).

In enacting the unsuitability designation process, Congress noted "that the designation process is structured to be applied on an area basis, rather than a site by site determination which presents issues more appropriately addressed in the permit application process." H. Rep. No. 95-218, 95th Cong., 1st Sess. 95 (1977). Moreover, Congress emphasized that this "section does not require the designation of areas as unsuitable for surface mining other than where it is demonstrated that reclamation of an area is not physically or economically feasible under the standards of the act." *Id.* at 94. In keeping with this general nature of the unsuitability process, the regulations promulgated pursuant to the Act provide that the unsuitability process is legislative, rather than adjudicatory, in nature. *See* 44 Fed. Reg. 15,003-04 (1979) (discussing legislative nature of unsuitability determination under regulations); *Utah International, Inc. v. Department of the Interior*, 553 F. Supp. 872, 880 (D. Utah

1982). *See generally* Van Buskirk & Dragoo, *The Designation of Coal Lands as "Unsuitable" for Surface Coal Mining Operations*, 27A Rocky Mtn. Min. L. Inst. 339 (1982); Gorrell & Russell, *The Petition Process for Designating Lands Unsuitable for Surface Coal Mining Operations: Extreme Solution or Unnecessary Exercise*, 71 Ky. L.J. 57 (1982); Note, *Designating Areas Unsuitable for Surface Coal Mining*, 1978 Utah L. Rev. 321.[2]

Having set the statutory and regulatory context, we turn now to the proceedings leading to the instant appeal. Prager filed his unsuitability petition with the Office of Surface Mining Reclamation and Enforcement on August 3, 1981, and filed an amended petition on October 13, 1981. The petition as amended covered approximately 9,475 acres on the Camp Swift Military Reservation. Prager based his petition on six grounds: 1) that mining would have an adverse effect on the area's water supply; 2) that the soil in the area would not support reclamation efforts; 3) that the area constituted a suitable habitat for the Houston toad, an endangered species; 4) that mining would increase flooding hazards and erosion; 5) that the area contained at least 1,000 acres of prime farmland; and 6) that at least five cemeteries were located in the area.

In response to Prager's petition, the Secretary compiled an extensive record containing technical reports concerning the allegations in Prager's petition. The Secretary's consultations extended to include economists as well as study regarding the hydro-

[2]In accordance with the legislative and land-use planning nature of the unsuitability petition process, OSM determined that no party should bear the burden of proof in the unsuitability determination process. 30 C.F.R § 769.14(d)(1982). Some commentators have criticized the failure of the regulations to place a burden of proof on the petitioner. *See* Van Buskirk & Dragoo, *supra*, at 391; Gorrell & Russell, *supra*, at 71-72. Van Buskirk and Dragoo, in particular, feel that the failure to place a burden of proof will result in problems where the data on a particular issue are lacking, nonconclusive, or conflicting. The validity of the regulations, however, is not questioned on this appeal. *See generally* In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519, 1538-59 (D.D.C. 1985). Moreover, Prager does not contend that the Secretary improperly placed the burden of proof on him on appeal. Rather, Prager asserts that the Secretary failed to adequately consider the issue of economic feasibility. Since we find that the Secretary adequately considered the issue of economic feasibility in accordance with the scheme of the Act, we need not address the situation suggested by the commentators when there is an inadequate consideration of economic factors.

logic impact of surface coal mining in the area. The Secretary addressed each of the issues contained in Prager's petition. The Secretary's study was summarized, after a public hearing and extensive commentary from the petitioner Prager and other concerned citizens and organizations, in the final draft of the Petition Evaluation Document ("PED"). This document discussed the potential problems of surface coal mining in the area and the methods which were feasible in assuring reclamation pursuant to the requirements of the Act following any surface coal mining.[3]

Based on the extensive evidence presented, the Secretary, acting through OSM Director James Harris, declined to designate the Camp Swift area as unsuitable for surface coal mining. Director Harris summarized his decision;

> I decline to designate all, or any parts, of the Camp Swift petition area as unsuitable for either surface or underground coal mining. I find that there is insufficient evidence to demonstrate that, as the petitioners allege, reclamation of surface coal mining operations in the petition area, pursuant to the requirements of SMCRA, is not technologically and economically feasible. I also find that there is insufficient evidence to demonstrate that, as the petitioners further allege, surface coal mining operations within the petition area could result in a substantial loss of or reduction in long-range productivity of water supplies or of food or fiber products.

[3]As noted, the PED considers each of the allegations raised in Prager's petition. With regard to the effect on the hydrologic balance from surface coal mining, the PED details possible impacts. The PED notes in detail that there would be no reduction in yield from an aquifer in the area and that technology (such as reconstruction of the near-surface soil system, use of water impoundments, burial of acid-producing soil, and revegetation) is available in order to prevent material damage to the water balance. The PED also includes an economic forecast concerning the supply and demand for coal from the Camp Swift area and concludes that "there is a relatively strong market for the petition area coal in 1995." The PED also discusses Prager's petition concern that cultural and historic resources would be threatened by the disruption of cemeteries in the petition area and concludes that any effect would be minimal by avoiding the areas or by moving the cemeteries in accordance with Texas law. With regard to the endangered species, the Houston toad, the PED notes that a survey of the petition area found no Houston toads and that mitigating measures, such as creating small ponds, could be employed to preserve the species' habitat.

Prager thereafter filed a pro se complaint in federal district court, seeking judicial review of the Secretary's decision pursuant to 30 U.S.C. § 1276. After considering summary judgment motions filed by both parties, the district court, noting that "the record contains a great deal of evidentiary support for the Secretary's findings and shows a consideration of all relevant factors," granted summary judgment for the Secretary. Prager then filed the instant appeal.

[2] In reviewing the Secretary's decision, this Court must determine whether the Secretary acted arbitrarily and capriciously in his determination. *See* 30 U.S.C.§ 1276(a)(1).[4] The arbitrary and capricious standard requires the reviewing court to make a searching and careful inquiry into the facts before the agency and to consider whether the action taken "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). The reviewing court is not "empowered to substitute its judgment for that of the agency." *Id.* Recently, the Supreme Court stated:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

[3] On appeal, Prager fully concedes that the Secretary did not act arbitrarily or capriciously in determining that reclamation pursuant to the terms of the Act is technologically feasible. Rather, Prager contends that the Secretary acted arbitrarily and capriciously in determining that reclamation pursuant to te Act was not econom-

[4]The parties agree that the arbitrary and capricious standard applies in review of the Secretary's decision.

not economically infeasible. Prager contends that there is insufficient evidence to indicate that the Secretary considered the economic feasibility of the various reclamation methods proposed.

On this review of the Secretary's unsuitability determination, this Court cannot agree with Prager's contention that the Secretary acted arbitrarily and capriciously with regard to economic feasibility. Rather, the PED repeatedly refers to reclamation technologies which have been employed in other surface coal mining operations, thus indicating the economic feasibility of such approaches. The PED also indicates that the Secretary was sensitive to the costs of the reclamation methods in that the Secretary noted that one method of revegetation was cost prohibitive. Prager particularly complains that the Secretary acted arbitrarily in the Secretary's observation that the ultimate economic feasibility of the reclamation technology would have to be considered by the operator when confronted with the requirements of the Act at the mine permit stage. However, as had been noted, one purpose of the unsuitability process is to address the feasibility of reclamation on an area basis. In light of this purpose of the unsuitability process and the present record, we cannot agree with Prager's contention that the Secretary wholly abandoned the issue of economic feasibility in making this observation. In the context of the unsuitability determination, then, it cannot be said that the Secretary acted arbitrarily and capriciously in declining to designate the Camp Swift area as unsuitable for surface coal mining.[5]

Accordingly, the judgment of the district court is

AFFIRMED

[5]We note the limited nature of this appeal and the proceedings before the agency. The Secretary's determination does not approve actual surface mining in the Camp Swift area. Indeed, the regulations seek to prevent the unsuitability determination from being converted into a "suitability" determination. *See* 44 Fed. Reg. 15,001 (1979). We also note that the current regulations provide for a second petition on federal lands when the second petition presents significant new allegations of facts. *See* 30 C.F.R. § 769.14(a)(2)(B) (1985).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1060

JOHN R. PRAGER, Plaintiff-Appellant.

versus

DONALD P. HODEL, Secretary of the Department of Interior, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

( )

Before RUBIN, POLITZ and JOHNSON, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED;

The Court has carefully examined all issues raised in appellant's briefs and petition for rehearing.

ENTERED FOR THE COURT:

/s/ SAM D. JOHNSON 8/4/86
United States Circuit Judge

REHG-4

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOHN R. PRAGER, Plaintiff	)	
V.	)	No. A-82-CA-514
JAMES WATT, et al., Defendants	)	

O R D E R

Came on this the 3rd day of December, 1984, for consideration Defendant's Motion for Summary Judgment and this Court, having considered said motion and the responses filed thereto, notes the following. On August 7, 1981, Plaintiff submitted a petition to the Office of Surface Mining Reclamation and Enforcement (OSM) to declare certain Federal lands on the Camp Swift Military Reservation in Bastrop County, Texas, to be unsuitable for surface coal mining operations. Plaintiff filed an amended petition with that office on

Cayman Turtle Farm, Ltd. v. Andrus, 478 F. Supp. 125, 131 (D.D.C. 1979). Therefore, based upon this standard the Court must consider whether the decision was based upon a consideration of all relevant factors. Because the record contains a great deal of evidentiary support for the Secretary's findings and shows a consideration of all relevant factors, the Court finds the Motion for Summary Judgment to be meritorious. Accordingly,

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment be and is hereby in all things GRANTED.

SIGNED and ENTERED this 3rd day of December, 1984.

/s/ WALTER S. SMITH, JR.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE